A

MOHD ZAI MUSTAFA v. MENTERI PENDIDIKAN MALAYSIA & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
M GUNALAN JCA
B AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NOS: W-01(IM)(NCVC)-682-11-2021; W-01(IM)(NCVC)-59-01-2022; W-01(IM)(NCVC)-60-01-2022; W-01(IM)(NCVC)-61-01-2022; W-01(IM)(NCVC)-64-01-2022; W-01(IM)(NCVC)-65-01-2022; D-01(NCVC)(A)-402-06-2022
C & D-01(NCVC)(A)-458-06-2022]
8 DECEMBER 2023

Abstract – *(i) A school is neither a statutory authority nor a public authority, and accordingly, the use of a language other than Malay in national-type schools as a medium of instruction would not be for an 'official purpose' and would therefore be permissible by the proviso in art. 152(1)(a) of the Federal Constitution; (ii) The use of Tamil or Chinese in national-type schools as a medium of instruction is protected by the proviso in art. 152(1)(b) of the FC. This proviso has the effect of 'grandfathering' the use of other languages at the time of the proclamation of Merdeka, due to the words 'preserve and sustain.' Where it can be established that a language had been used immediately prior to Merdeka, nothing in art. 152 should be read as limiting the right of Government to preserve the use of the language and to take steps to sustain its continued use.*

CIVIL PROCEDURE: *Action – Disposal of – Disposal on point of law – Determination of question of law or construction – Whether questions of law capable of being determined based entirely upon undisputed and agreed facts – Whether role of courts to review policies of Government – Whether evidence sought to be adduced irrelevant to exercise of Legislative and constitutional construction – Whether suits suitable for disposal pursuant to O. 14A of Rules of Court 2012*

CONSTITUTIONAL LAW: *Education – Vernacular schools – Establishment of – Legality and constitutionality – Use of Chinese and Tamil languages as medium of instruction – Whether ss. 2, 17 and 28 of Education Act 1996 inconsistent with art. 152(1) of Federal Constitution ('FC') – Whether existence of such national-type schools in contravention of Federal Constitution providing for fundamental liberties of individuals – Whether use of language other than Malay as medium of instruction in schools existed since pre-Merdeka – Whether art. 152(1)(b) possesses right to preserve and sustain such language – Whether vernacular schools considered public authorities for purpose of art. 152(6) of FC*

The appeals herein related to challenges on the legality and constitutionality of the vernacular schools system in Malaysia. There were eight appeals which emanated from three suits filed at the High Court: two were commenced as writ actions at the Kuala Lumpur High Court (Suit 84 and Suit 2) while the third suit was an originating summons action commenced at the Kota Bharu High Court (OS 66). The plaintiffs were the office bearers of various non-governmental organisations while the defendants were the Minister of Education and the Government of Malaysia. Several other parties representing various interests were subsequently included as co-defendants. In Suit 84, the plaintiffs sought the following reliefs, *inter alia*: (i) a declaration that ss. 2, 17 and 28 of the Education Act 1996 ('Education Act') (which relate to the establishment and maintenance of vernacular or national-type schools where the medium of instruction was either Tamil or Chinese) were inconsistent with art. 152(1) of the Federal Constitution ('FC') (which among others established Malay as the national language) and that accordingly, these provisions were null and void to the extent of such inconsistency; (ii) a declaration that the existence of such national-type schools was in contravention of certain provisions in the FC, providing for the fundamental liberties of individuals, specifically arts. 5, 8, 10, 11 and 12; and (iii) an order directing the Minister of Education and the Government to bring national-type schools into compliance with art. 152(1) within a period of six years of judgment. Suit 84 was heard together with Suit 2. The plaintiff in Suit 2 sought similar reliefs as the plaintiffs in Suit 84, and also sought declarations that: (i) ss. 17 and 28 of the Education Act were in contravention of art. 152 of the FC; and (ii) such provisions of the Education Act, in so far as they related to national-type schools, were void. Some of the defendants in Suit 2 and Suit 84 made applications for the cases to be disposed of pursuant to the procedures provided for under O. 14A of the Rules of Court 2012 ('ROC'). The judge hearing the application determined that both suits were suitable for disposal pursuant to O. 14A. The second plaintiff in Suit 84 appealed to this court against this determination ('Appeal 682'). Having determined that the suits were suitable for disposal under the procedure provided for under O. 14A and that the suits constituted an inconsistency challenge, the High Court proceeded to address the substantive questions of law and construction that were posed to the High Court. On the merits of the suits, both Suits 2 and 84 were dismissed. The appeals recorded as Appeals 59, 60, 61, 64 and 65 were appeals by the plaintiffs in Suits 2 and 84 against the determination of the High Court at Kuala Lumpur on the substantive questions of law and construction posed to the court in the O. 14A application. The plaintiff at the High Court Kota Bharu in OS 66 sought (among others) the court to declare that ss. 17 and 28 of the Education Act are inconsistent with art. 152 of the FC and are accordingly, null and void to the extent of such inconsistency. The Judicial Commissioner ('JC') of the High Court Kota Bharu dismissed OS 66. The plaintiff appealed against this decision ('Appeal 402'). In coming to his decision, the JC made the

finding that national-type schools were 'public authorities' for the purposes of art. 150(6) and within the meaning of art. 160(2) of the FC. The fourth and fifth defendants in OS 66 appealed against this finding ('Appeal 458'). The issues that arose for the court's determination were: (i) the appropriateness of the O. 14A application; (ii) whether ss. 2, 17 and 28 of the Education Act are inconsistent with art. 152; and (iii) whether the establishment and existence of the national-type schools infringed arts. 5, 8, 10, 11 and 12 of the FC.

Held (allowing Appeal 458; dismissing all other appeals)
Per Azizul Azmi Adnan JCA delivering the judgment of the court:

(1) The existence of a question of law or construction to be determined by the court must be clearly discernible from the pleadings of the parties. The question of law or construction must be also one that is capable of being determined without a full trial of the action, and hence the procedure in O. 14A may not be appropriate where there are conflicting allegations of fact that affect the determination of the questions of law or construction, or where there are facts in issue that are interwoven with the legal issues raised. The questions posed herein – relating to the *locus standi* of the plaintiffs and the justiciability of the matters in dispute – were questions of law that were capable of being determined based entirely upon the undisputed and agreed facts. The evidence sought to be adduced by the plaintiffs regarding the appropriate allocation of funding to educational institutions, and the articles and news items on the contended deficiencies of the education system were not germane to the exercise of construing the relevant provisions of the Education Act and of the FC. (paras 23-26)

(2) The effects of the education policy are matters relating to the stated policies of Government and the manner in which those policies are implemented. Even if those policies run contrary to whatever may be perceived as a desirable outcome – for example, if it is argued that the existence of the national-type schools has contributed to the increased polarisation of society – it would be quite beyond the pale for the courts to intervene. It is not the role of the courts to review the policies of Government. The policy and intent of Parliament are simply aids to the court in interpreting legislation, and in the context of the present case, to determine whether the legislation in question is inconsistent with the terms of the FC. By contrast, the effects of Government policy – which was the evidence sought to be adduced by the plaintiffs through *viva voce* testimony – were simply irrelevant to the exercise of Legislative and constitutional construction. Hence, Appeal 682 was dismissed. (paras 27 & 30)

(3) Based on a proper construction of the terms of arts. 152(6) and 160(2) of the FC, the vernacular or national-type schools are not public authorities, and hence the use of Tamil or Chinese in these schools as a medium of instruction would not be prohibited or contrary to the FC, because such use should not properly be considered to be used for an official purpose within the meaning of art. 152(6) of the FC. A school is neither a statutory authority nor a public authority, and accordingly, the use of a language other than Malay in national-type schools as a medium of instruction would not be for an 'official purpose' and would therefore be permissible by the proviso in art. 152(1)(a) of the FC. Even if schools were the instruments by which the national curriculum is implemented, this did not mean schools were exercising powers conferred to them by written law, for it was the Minister who exercises this power. Thus, this court allowed Appeal 458, which was the appeal against the determination by the High Court Kota Bharu that vernacular schools were 'public authorities' for the purpose of art. 152(6) of the FC. (paras 33, 50, 52 & 53)

(4) The use of Tamil or Chinese in national-type schools as a medium of instruction is protected by the proviso in art. 152(1)(b) of the FC. This proviso has the effect of 'grandfathering' the use of other languages at the time of the proclamation of Merdeka, due to the words 'preserve and sustain.' Where it can be established that a language had been used immediately prior to Merdeka, nothing in art. 152 should be read as limiting the right of Government to preserve the use of the language and to take steps to sustain its continued use. If it is accepted that the use of a language other than Malay as a medium of instruction in schools existed even before Merdeka, it followed that the Government, by proviso (b), is possessed of the right to preserve and sustain such use. This right overrides the proscription in proviso (a) providing that only the Malay language shall be the language used for official purposes, due to the opening words in proviso (b). (paras 54-56)

(5) It could not be seriously argued that the framers of the FC had intended for schools employing a language other than Malay or English as a medium of instruction to be unlawful and contrary to the terms of the FC, for if this were the case, such schools would have been shut down, abolished or converted upon the adoption of the FC. It was not in material dispute that schools employing Tamil or Chinese as a medium of instruction had existed even before the promulgation and adoption of the FC. A contextual construction of the relevant provisions of the FC does not support the contention of the plaintiffs that the provisions of the Education Act providing for the establishment and maintenance of national-type schools employing Tamil or Chinese as a medium of instruction were inconsistent with art. 152 of the FC. (paras 59-62)

(6) Not only were the establishment and maintenance of national-type schools not inconsistent with art. 152(1), but also that the use of Tamil and Chinese in such schools were subject to the protection accorded under art. 152(1)(b). That being the case, this court failed to see how it may reasonably be argued that these constitutionally protected rights militate against the fundamental liberties in Part II of the FC. (para 64)

(7) Enrolment in a national-type school is entirely voluntary. There would be nothing in the law that would prevent the parents of a child from choosing a national school (with Malay as the medium of instruction) over a national-type school. Thus, even if the reduction in opportunities is real and not merely illusory, the decision to attend a national-type school would not have been one forced upon the parents of the child, and would have been made with the attendant benefits of a national-type school in mind, such as perhaps the preservation of the sense of connection to one's culture and heritage, and indeed the promotion of the diversity and multi-culturalism that makes our society unique. That there exists a choice would vitiate any notion of impingement of fundamental liberties. (para 68)

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Lekaz Constructions Sdn Bhd v. KOP Petroleum Sdn Bhd; HSBC Bank Malaysia Bhd (Intervener) [2003] 4 CLJ 377 HC ***(refd)***

Merdeka University v. Government Of Malaysia [1982] CLJU 1; [1982] 1 LNS 1 FC ***(dist)***

Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors [2022] 6 CLJ 431 HC ***(refd)***

Mohd Azizee Hasan lwn. Menteri Pendidikan Malaysia & Yang Lain [2022] 8 CLJ 446 HC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

PP v. Mark Koding [1982] CLJU 96; [1982] 1 LNS 96 HC ***(dist)***

Wang Bao' An & Ors v. Malaysian Airline System Bhd & Other Cases [2018] 7 CLJ 371 HC ***(refd)***

Legislation referred to:

Education Act 1996, ss. 2, 17, 28

Federal Constitution, arts. 5, 8, 10, 11, 12, 150(6), 152(1)(a), (b), (6), 160(2)

Rules of Court 2012, O. 14A r. 1(1)

Sedition Act 1948, s. 4(1)(b)

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For the MAPPIM & GAPENA - Mohamed Haniff Khatri Abdulla & Aidil Khalid; M/s Amelda Fuad Abi & Aidil

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[Editor's note: For the High Court judgment, please see Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors [2022] 6 CLJ 431; Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors And Another Case [2022] CLJU 1162; [2022] 1 LNS 1162 & Mohd Azizee Hasan lwn. Menteri Pendidikan Malaysia & Yang Lain [2022] 8 CLJ 446 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] The appeals in the present case related to challenges on the legality and constitutionality of the vernacular schools system in Malaysia. There were eight appeals, which emanated from three suits filed at the High Court: two were commenced as writ actions in the High Court at Kuala Lumpur (Suit Nos. WA-21NCVC-84-12/2019 and WA-21NCVC-2-01/2020), while the third case was an originating summons action commenced in the High Court at Kota Bharu (OS No. DA-24NCVC-66-02/2020).

The Parties

[2] The plaintiffs at first instance were the office bearers of various non-governmental organisations: Gabungan Pelajar Melayu Semenanjung (GPMS), Pertubuhan Pembangunan Pendidikan Islam Malaysia (MAPPIM), Gabungan Persatuan Penulis Nasional Malaysia (GAPENA), Pertubuhan Ikatan Muslimin Malaysia (ISMA) and Ikatan Guru-Guru Muslim Malaysia.

[3] In all the cases, the Minister of Education and the Government of Malaysia were named as defendants. Several other parties representing various interests were subsequently included as co-defendants.

The Two Writ Actions In The High Court At Kuala Lumpur

[4] In the writ action WA-21NCVC-84-12/2019 (referred to here as "Suit 84"), the plaintiffs sought the following reliefs:

(i) a declaration that ss. 2, 17 and 28 of the Education Act 1996 (which relate to the establishment and maintenance of vernacular or national-type schools where the medium of instruction is either Tamil or Chinese[1]) were inconsistent with art. 152(1) of the Federal Constitution (which among others established Malay as the national language) and that accordingly these provisions were null and void to the extent of such inconsistency;

(ii) a declaration that the existence of such national-type schools were in contravention of certain provisions in the Federal Constitution providing for the fundamental liberties of individuals, specifically art. 5 (the right to life and liberty), art. 8 (the right to equality before the law), art. 10 (the right of freedom of speech and expression), art. 11 (the right to religion) and art. 12 (the right of equal access to education); and

(iii) an order directing the Minister of Education and the Government to bring national-type schools into compliance with art. 152(1) within a period of six years of judgment.

[5] Suit 84 was heard together by the High Court at Kuala Lumpur with the writ action WA-21NCVC-2-01/2020 ("Suit 2"). The plaintiff in Suit 2 sought similar reliefs as the plaintiffs in Suit 84. In Suit 2, the plaintiff sought for declarations that:

(i) sections 17 and 28 of the Education Act 1996 were in contravention of art. 152 of the Federal Constitution; and

(ii) such provisions of the Education Act 1996, in so far as they were related to national-type schools, were void.

[6] Some of the defendants in Suit 2 and Suit 84 made applications for the cases to be disposed of pursuant to the procedures provided for under O. 14A of the Rules of Court 2012. The judge hearing the application, Mohd Nazlan Ghazali J (as His Lordship then was), determined that both suits were suitable for disposal pursuant to O. 14A. The second plaintiff in Suit 84 appealed to this court against this determination, which appeal was recorded as Appeal No. 682 before us.

[7] Having determined that the suits were suitable for disposal under the procedure provided for under O. 14A and that the suits constituted an inconsistency challenge (and not an incompetency challenge) and that accordingly, the High Court was seized with the requisite jurisdiction to hear the suits, Nazlan J thereafter proceeded to address the substantive questions of law and construction that were posed to the High Court. On the merits of the cases, both Suits 2 and 84 were dismissed.

[8] The appeals recorded as Appeal Nos. 59, 60, 61, 64 and 65 were the appeals by the plaintiffs in Suits 2 and 84 against the determination of the High Court at Kuala Lumpur on the substantive questions of law and construction posed to the court in the O. 14A application.

The Kota Bharu Originating Summons

[9] The plaintiff at the High Court at Kota Bharu in the Originating Summons No. DA-24NCVC-66-02/2020 ("OS 66") sought (among others) for the court to declare that ss. 17 and 28 of the Education Act 1996 are inconsistent with art. 152 of the Federal Constitution and that accordingly, they are null and void to the extent of such inconsistency.

[10] The learned Judicial Commissioner at the High Court at Kota Bharu dismissed OS 66. The plaintiff in that case appealed against this decision, which appeal was recorded before us as Appeal No. 402.

[11] In coming to this decision, the Judicial Commissioner made the finding that national-type schools were "public authorities" for the purposes of art. 150(6) and within the meaning of art. 160(2) of the Federal Constitution. The fourth and fifth defendants in OS 66 appealed against this finding. This appeal was recorded as Appeal No. 458.

[12] These grounds constitute the judgment of the court.

Summary Of The Decision Of The Court

[13] We summarise our findings as follows:

(i) in relation to Appeal No. 682, on the suitability of the O. 14A procedure, we dismissed the appeal for the following reasons:

(a) it was plain to us that the first two questions posed, which related to the issue of *locus standi* of the plaintiffs and the justiciability of the matters in dispute, were questions of law that were entirely capable of being determined based entirely upon the undisputed and agreed facts;

(b) in connection with the contention of the plaintiff in Suit 84 that *viva voce* testimony must be received to show the effects of the Government's education policy, we were of the view that the effects of Government policy are simply irrelevant to the exercise of Legislative and constitutional construction;

(c) on the question of whether it will be necessary to lead oral testimonies of witnesses in order to introduce the various historical documents providing context to the provisions of the Federal Constitution, we were of the view that these documents already form part of the historical record of the nation and were admissible on this basis;

(ii) in our judgment, based on a proper construction of the terms of arts. 152(6) and 160(2), vernacular or national-type schools are not public authorities, and hence, the use of Tamil or Chinese in these schools as a medium of instruction would not be prohibited or contrary to the Constitution. Hence, the appeal in Appeal No. 458 was allowed;

(iii) where a language had been used in schools as a medium of instruction immediately prior to Merdeka, the proviso in art. 152(1)(b) of the Federal Constitution confers the right on the Government to preserve the use of the language and to take steps to sustain its continued use, and hence the relevant provisions of the Education Act 1996 cannot be said to be unconstitutional;

(iv) had the framers of the Constitution intended for schools employing a language other than Malay or English as a medium of instruction to be considered unlawful and unconstitutional, such schools would have been shut down, abolished or converted upon the adoption of the Federal Constitution. That this was not done points to a contrary intention;

(v) the argument that vernacular schools became unconstitutional with the amendment to art. 152(6) in 1971 cannot be accepted, because there is nothing in the record of Parliamentary proceedings that suggests that Parliament had intended for the amendment to art. 152(6) to strike at the legality or constitutionality of vernacular schools;

(vi) if the use of Tamil and Chinese in such schools are subject to the protection accorded under the art. 152(1)(b), it cannot be that these constitutionally protected rights militate against the fundamental liberties contained in Part II of the Federal Constitution;

(vii) in any event, enrolment in national-type schools is entirely voluntary. Thus, even if their existence impinges upon the fundamental liberties of the attendees (which is doubted), that there is a freely exercisable choice would vitiate any notion of such impingement; and

(viii) as a consequence of our findings summarised at paras. (ii) to (vii) *ante*, the appeals in Appeal Nos. 59, 60, 61, 64, 65 and 402 were dismissed.

[14] The analyses underlying these findings are explained in the following paragraphs. The summary above should be read as being subject to what follows.

The Appropriateness Of The Order 14A Application

[15] It was advanced for the appellant in Appeal No. 682, En Mohd Zai bin Mustafa, who represented MAPPIM, that the writ action in Suit 84 was not an appropriate case for determination under the procedure provided for in O. 14A of the Rules of Court 2012. MAPPIM, together with GPMS and

GAPENA, were the *de facto* plaintiffs in Suit 84, and they resisted the applications by the first, second, sixth, seventh and 13th defendants for Suit 84 to be disposed of by way of the determination of questions of law.

[16] According to counsel for MAPPIM, the issues in dispute involved a mixed question of law and fact, which would require the need for oral testimonies of witnesses.

[17] The submissions advanced for the plaintiffs in the writ action did not find favour with the High Court, and the court determined that the matters in dispute were suitable for determination by way of an application under O. 14A, and that this determination would result in the disposal of the entire dispute between the parties. MAPPIM, through En Zai, appealed against this decision.

The Questions Posed To The High Court

[18] The four questions posed to the High Court in the O. 14A application may be paraphrased into the following:

(i) whether the plaintiffs were sufficiently seized with *locus standi* to commence the writ action;

(ii) whether the matters in contention were justiciable before the courts;

(iii) whether ss. 2, 17 and 28 of the Education Act 1996 are inconsistent with art. 152(1) of the Federal Constitution; and

(iv) whether the establishment and existence of Chinese and Tamil national-type schools were inconsistent with arts. 5, 8, 10, 11 and 12 of the Federal Constitution.

The Applicable Principles

[19] The applicable principles were not in material dispute between the parties, and thus, it suffices that we summarise them here.

[20] Order 14A r. 1(1) of the Rules of Court 2012 provides as follows:

> Disposal of Case on Point of Law
>
> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[21] The existence of a question of law or construction to be determined by the court must be clearly discernible from the pleadings of the parties. The question of law or construction must also be one that is capable of being determined without a full trial of the action, and hence, the procedure in O. 14A may not be appropriate where there are conflicting allegations of fact that affect the determination of the questions of law or construction, or where there are facts in issue that are interwoven with the legal issues raised. Where there exist disputes of fact on the affidavits, the court may, nonetheless, proceed to exercise its discretion to determine whether the undisputed or agreed facts provide a sufficient basis to determine the question of law or construction: see *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297. A court should not decline to consider an application under O. 14A simply on the basis that the question of law or issue of construction is or appears to be complicated. (See *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2003] 5 AMR 696; [2004] 1 MLJ 8; [2003] 1 MLRA 582). The determination of the application under O. 14A need not necessarily dispose of the entire case; it suffices if the answer arrived at by the court disposes of "any claim or issue" in the action (*supra*, and *Wang Bao' An & Ors v. Malaysian Airline System Bhd & Other Cases* [2018] 7 CLJ 371; [2018] 11 MLJ 585). The question of law or construction, which the court is to determine, must be set out in clear and precise terms (*Lekaz Constructions Sdn Bhd v. KOP Petroleum Sdn Bhd; HSBC Bank Malaysia Bhd (Intervener)* [2003] 4 CLJ 377; [2003] 6 AMR 74).

Analysis

[22] It was plain to us that the first two questions posed – relating to the *locus standi* of the plaintiffs and the justiciability of the matters in dispute – were questions of law that were capable of being determined based entirely upon the undisputed and agreed facts.

[23] In relation to the remaining two questions posed, the plaintiffs' position was that these questions – which related to the substantive challenge on the legality of the national – type schools and the constitutionality of the laws providing for their existence – can only be determined at a full trial of the action, because of the following reasons:

(i) the plaintiffs made the factual contention that the existence and maintenance of the national-type schools draw funding away from other schools under the authority of the Ministry of Education, such as tahfiz schools, which have difficulty in obtaining financial allocation from the Government. Whether this factual contention is made out can only be determined at a trial of the action;

(ii) witnesses will need to be called to put before the court for the various reports on the education system such as the Barnes Report of 1951, the 1951 Fenn-Wu Report, the Razak Report of 1956, the Rahman Talib Report of 1960, the National Education Policy of 1979 as well as the Education Act 1996; and

(iii) the plaintiffs pleaded various news reports and studies, the sum effect of which was intended to show – and in this regard, we paraphrase – that the existence of national-type schools has led to a poor grasp of the Malay language within certain parts of society, and which was not conducive to integration and unity of Malaysians as a whole. These news reports and studies – according to the plaintiffs – can only be adduced at a trial of the action, to prove the contention that the existence of the national-type schools contravened arts. 5, 8, 10, 11 and 12 of the Federal Constitution (which, as explained, relate to the fundamental liberties of individuals).

[24] These questions – according to the plaintiffs – cannot be decided by the court *in vacuo*, without a determination of the material facts. Hence, it was argued that the O. 14A procedure was inappropriate in the circumstances.

[25] The High Court disagreed with the contentions of the plaintiff[2]. We saw no reason to disagree with the conclusion of the learned High Court Judge.

[26] In our considered view, the evidence sought to be adduced by the plaintiffs regarding the appropriate allocation of funding to educational institutions, and the articles and news items on the contended deficiencies of the education system were not germane to the exercise of construing the relevant provisions of the Education Act 1996 and of the Federal Constitution.

[27] The effects of the education policy are matters relating to the stated policies of Government and the manner in which those policies are implemented. Even if those policies run contrary to whatever may be perceived as a desirable outcome – for example, if it is argued that the existence of the national-type schools has contributed to the increased polarisation of society – it would be quite beyond the pale for the courts to intervene. As correctly pointed out by Nazlan J at the High Court, it is not the role of the courts to review the policies of Government. The policy and intent of Parliament are simply aids to the court in interpreting legislation, and in the context of the present case, to determine whether the legislation in question is inconsistent with the terms of the Federal Constitution, as alleged by the plaintiffs. By contrast, the effects of Government policy – which was the evidence sought to be adduced by the plaintiffs through *viva voce* testimony – are simply irrelevant to the exercise of Legislative and constitutional construction.

[28] On the question of whether it will be necessary to lead oral testimonies of witnesses in order to introduce the various historical documents providing context to the provisions of the Federal Constitution, we can do no better than to reproduce the following passage from the judgment of Nazlan J in the court below:

A [42] I repeat that there is no necessity to call witnesses just to tender the several historical documents, such as the Barnes Report 1951, the Fenn-Wu Report 1951, the Razak Report 1956 and the Rahman Talib Report 1960 at the trial. These documents are available at the National Archives. Under s. 57(1)(a) of the Evidence Act 1950, the court is entitled to take judicial notice "of all laws or regulations having the force in law now or B heretofore in force or hereafter to be in force in Malaysia or any part thereof". Under s. 57(2), on all matters of public history and literature, the court "may resort for its aid to appropriate books or documents of reference". Further, under s. 57(3), if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until the person produces any such book or document as it considers C necessary to enable it to do so.

[29] The documents referred to form part of the historical record of the nation and are admissible on this basis, and no further purpose would be served by having them tendered into evidence by witnesses who most certainly would not be the makers of the documents themselves. D

[30] For the reasons explained in the foregoing paragraphs, the appeal in Appeal No. 682 was dismissed.

[31] In the following paragraphs, we address the substantive issues raised regarding first, the consistency or otherwise of ss. 2, 17 and 28 of the E Education Act 1996 with art. 152(1) of the Federal Constitution, and second, whether the establishment and existence of the national-type schools infringe arts. 5, 8, 10, 11 and 12 of the Constitution.

Whether Sections 2, 17 And 28 Of The Education Act 1996 Are Inconsistent With Article 152 F

[32] The effect of art. 152 of the Federal Constitution – and this appears to be common ground between the parties – is that only Malay, as the national language, may be used for official purposes. Where the parties differ is whether the use of languages other than Malay as a medium of instruction G in schools is an "official purpose".

[33] Based on a proper construction of the terms of arts. 152(6) and 160(2), we are of the view that the vernacular or national-type schools are not public authorities, and hence, the use of Tamil or Chinese in these schools as a medium of instruction would not be prohibited or contrary to the Federal H Constitution, because such use should not properly be considered to be used for an official purpose within the meaning of art. 152(6) of the Constitution.

The Relevant Provisions Of The Education Act 1996

[34] The provisions of the Education Act 1996 under challenge were ss. 2, I 17 and 28. Section 17 is the principal provision providing for Malay, being the national language, as the medium of instruction in all educational

institutions. As a specific and express exception, national-type schools established under s. 28 are exempt from the requirement to conduct teaching in Malay. Section 17 provides as follows:

> Section 17. National language as the main medium of instruction.
>
> (1) The national language shall be the main medium of instruction in all educational institutions in the National Education System except a national-type school established under section 28 or any other educational institution exempted by the Minister from this subsection.
>
> (2) Where the main medium of instruction in an educational institution is other than the national language, the national language shall be taught as a compulsory subject in the educational institution.

[35] Section 28 provides for the power of the Minister of Education to establish and maintain national-type schools:

> Section 28. Establishment and maintenance of national and national-type schools.
>
> Subject to the provisions of this Act, the Minister may establish national schools and national-type schools and shall maintain such schools.

[36] A national-type school – commonly referred to as a vernacular school – is defined in s. 2 of the Education Act 1996 to mean a primary school where the main medium of instruction is either Chinese or Tamil. The definition reads as follows:

> "national-type school" means a Government or government-aided primary school:
>
> (a) providing primary education appropriate for pupils from the age of six years;
>
> (b) using the Chinese or Tamil language as the main medium of instruction; and
>
> (c) in which the national and English languages are compulsory subjects of instruction;

Article 152

[37] Article 152(1) of the Federal Constitution provides for the Malay language as the national language of Malaysia. It reads as follows:

> National language
>
> 152. (1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide:
>
> Provided that:
>
> (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and

A

(b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

[38] The proviso in sub-para. (a) permits the use of languages other than
B Malay except where the use is for an official purpose. Sub-article (6) defines the expression "official purpose". It reads as follows:

(6) In this Article, "official purpose" means any purpose of the Government, whether Federal or State, and includes any purpose of a public authority.

C

[39] The key question is thus whether the use of a language as a medium of instruction in schools comes within the ambit of "official purpose". Is a school considered to be part of "Government", and is it a "public authority" within the meaning of sub-art. (6)?

D

[40] The expression "public authority" is further defined in art. 160(2) in the following terms:

"public authority" means the Yang di-Pertuan Agong, the Ruler or Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or State law, any court or tribunal other than the Federal
E Court, the Court of Appeal and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities;

[41] Reliance was placed by the plaintiffs on the cases of *Merdeka University v. Government Of Malaysia* [1982] CLJU 1; [1982] 1 LNS 1; [1982] 2 MLJ
F 243 and *PP v. Mark Koding* [1982] CLJU 96; [1982] 1 LNS 96; [1983] 1 MLJ 111 in support of the proposition that the use of a language as a medium of instruction in schools constituted use for an official purpose, and that accordingly art. 152 permitted only the use of the Malay language in that manner.

G

[42] The plaintiff in *Merdeka University* was a company limited by guarantee incorporated for the purposes of establishing a university. It submitted a petition to the Yang di-Pertuan Agong under the Universities and University Colleges Act 1971 for an incorporation order. In the petition, it was explained that the medium of instruction of the proposed university would
H be Chinese. The petition was rejected.

[43] The plaintiff then commenced a writ action, seeking (among others) to declare the rejection of its petition null and void. The suit was dismissed at first instance, and the plaintiff appealed to the Federal Court.

I

[44] The Federal Court by a 4:1 majority concluded that, if the proposed university were permitted to be established, it would be a public authority, and therefore the use of Chinese as a medium of instruction would constitute use for an official purpose, which was prohibited by the Federal Constitution.

[45] In *PP v. Mark Koding*, the accused was a member of the Nation's Fifth Parliament, having been elected as Barisan Nasional candidate for Kinabalu. He was charged under s. 4(1)(b) of the Sedition Act 1948 for having uttered words of a seditious tendency in a speech in Parliament. Among the statements made were an exhortation to the members of the Lower House to shut down vernacular schools. The High Court found the accused not guilty of sedition when he advocated for the closure of Tamil and Chinese schools. In coming to this finding, the court reasoned that art. 152(1) provided for the right to teach or learn Chinese or Tamil, but that this right did not extend to the right to teach or learn in Chinese or Tamil.

[46] In our considered view, both these cases can be distinguished from the present appeals. *PP v. Mark Koding* did not consider the question of whether a national-type school could properly be considered a "public authority" for the purposes of art. 152(6) and within the meaning of the definition of that expression in art. 160(2) of the Federal Constitution.

[47] *Merdeka University*, on the other hand, dealt with a proposed university that was held to be a public authority. In our view, schools are not public authorities, for the reasons explained in the following paragraphs.

[48] The Federal Court in *Merdeka University* referred to several indicia that distinguished a university as a public authority:

> A university established under the 1971 Act even if private clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds. Under section 3 of the 1971 Act the Minister of Education is responsible for the general direction of higher education and the administration of the Act. A university can receive grants-in-aid authorized by Parliament under section 11 and in this connection the Minister of Education has certain supervisory responsibilities. His Majesty and in effect the defendant would be responsible for the establishment of the campus and for making an order for this purpose in accordance with the provisions of section 12 and land may be acquired for the purposes of a university under section 13. The Minister of Education has also certain functions in relation to student activities and discipline under sections 15A and 15D.
>
> The Constitution of a university must contain provisions for all matters set out in the schedule to the Act (section 8) and these give wide powers to the administration of the university. The appointment of the Chancellor and Vice-Chancellor is to be made by His Majesty on

ministerial advice and after consultation with the Council of the university in the latter case, and of the Deputy Vice-Chancellor by the Minister of Education. Appointments to the Council and Court of the university include those by His Majesty and the Rulers and Governors of the several States and the Council will also include designated Government officers. His Majesty has power to amend the Constitution of a university at any time (section 8(3)) and by order exempt, vary or add to any of the provisions of the schedule to the Act (section 26).

[49] By contrast, these characteristics are not featured in schools. Nazlan J, in his judgment for Suits 2 and 84[3] explained the characteristics of schools at paras. 85 to 92:

[85] In my judgment, based on the legislative scheme of the Education Act 1996, unlike the proposed Merdeka University or a university established under the Universities and University Colleges Act 1971, a vernacular school or a national-type school under the Education Act 1996 does not sufficiently exhibit the requisite public element to be validly construed as a statutory authority. And neither can it be said that a vernacular school is a statutory authority which exercises the powers vested in it by the Education Act 1996.

[86] Vernacular schools essentially provide primary-level education, and the powers and functions under the Education Act 1996 are largely exercised by the Minister of Education.

[87] A vernacular or national-type school is only required to be registered with the Registrar General pursuant to s. 79(1) and (2) of the Education Act 1996. In turn the Registrar General may impose such terms and conditions as he deems fit when registering an educational institution such as a vernacular school as stated in s. 79(3). The Registrar General is also empowered under s. 84 to refuse a registration of an educational institution on seven specified grounds, none of which concerns the use of Chinese and Tamil languages. The Registrar General may even cancel the registration of a vernacular school on grounds specified under s. 87(1)(a) to (f).

[88] Unlike in the Universities and University Colleges Act 1971, the Minister of Education does not have the responsibility to acquire land for vernacular school and there are no similar provisions to ss. 15A and 15D of the Universities and University Colleges Act 1971 concerning student activities and discipline in the Education Act 1996.

[89] A vernacular school does not acquire the status as a body corporate upon establishment like a university under Section 7 of the Universities and University Colleges Act 1971, and there is no provision for the establishment of a vernacular school to be submitted to Parliament such as under Section 6 of Universities and University Colleges Act 1971 which mandates the order declaring the establishment of a university to be laid before both Houses of Parliament.

[90] In addition, regard must also be had to the provisions of art. 12(1) of the Federal Constitution on rights in respect of education. It reads:

12 Rights in respect of education

(1) Without prejudice to the generality of art. 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth:

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

[91] This constitutional provision, not discussed in *Merdeka University*, prohibits discrimination in the administration of an educational institution maintained by a public authority – which therefore clearly draws a distinction between an educational institution which admits pupils and students on the one hand and a public authority which maintains and funds such educational institution on the other hand.

[92] In other words, a vernacular school, which is an educational institution under the Education Act 1996 cannot at the same time be the public authority which maintains the school in the first place. In this context, given the wide definition of public authority in Article 160(2) which includes the Federal Government, there is reasonable basis to contend that the public authority for the vernacular schools is the Minister of Education.

[50] We agree and fully endorse the analysis employed, and the conclusion arrived at, by Nazlan J. A school is neither a statutory authority nor a public authority, and accordingly, the use of a language other than Malay in national-type schools as a medium of instruction would not be for an "official purpose" and would therefore be permissible by the proviso in art. 152(1)(a) of the Federal Constitution.

[51] In OS 66 heard by the High Court at Kota Bharu, the learned Judicial Commissioner hearing the originating summons came to the contrary opinion[4]. In the view of the Kota Bharu High Court, the establishment of schools was the statutory obligation of the Minister of Education, whose office is encompassed within the expression "a statutory authority exercising powers vested in it by Federal or State law". Schools bore the responsibility to implement educational policies and the prescribed curriculum, which in the view of the High Court, meant that schools were statutory authorities within the meaning of the Federal Constitution.

[52] We were unable to agree with this conclusion. Even if schools were the instruments by which the national curriculum is implemented, this does not mean schools were exercising powers conferred to them by written law, for it is the Minister who exercises this power, as acknowledged by the Judicial Commissioner himself.

[53] For this reason, we allowed the appeal in Appeal No. 458, which was the appeal by the representatives of Dong Zong and Jiao Zong against the determination by the High Court at Kota Bharu that vernacular schools were "public authorities" for the purposes of art. 152(6) of the Federal Constitution.

[54] The High Court at Kuala Lumpur came to the further conclusion – correctly in our view – that the use of Tamil or Chinese in national-type schools as a medium of instruction is protected by the proviso in art. 152(1)(b) of the Federal Constitution. It will be recalled that this proviso reads as follows:

> Provided that:
>
> (b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

[55] In our considered judgment, this proviso has the effect of "grandfathering" the use of other languages at the time of the proclamation of Merdeka, due to the words "preserve and sustain". Where it can be established that a language had been used immediately prior to Merdeka, nothing in art. 152 should be read as limiting the right of the Government to preserve the use of the language and to take steps to sustain its continued use.

[56] If it is accepted that the use of a language other than Malay as a medium of instruction in schools existed even before Merdeka, it follows that the Government, by proviso (b), is possessed of the right to preserve and sustain such use. This right overrides the proscription in proviso (a), providing that only the Malay language shall be the language used for official purposes, due to the opening words in proviso (b).

[57] To this extent, we disagreed with the *dicta* of the High Court in *PP v. Mark Koding*, where the learned judge stated:

> This strict interpretation is consistent with proviso (b) which guarantees the right of the Federal Government or any State Government to preserve and sustain the **use** and **study** of the language of any other community in the Federation. Thus, the preservation and sustenance of **usage** of language of any other community is guaranteed. So is the preservation and sustenance of study of any other community's language, but again there is no justification in extending the guarantee to the preservation and sustenance of study **in** the language of any other community in the absence of specific words to that effect.
>
> (emphasis added)

[58] While the learned judge is correct that proviso (b) makes reference to "study of the language" and not study in such language, the word use is, in our considered judgment, sufficiently broad to encompass the use of a

language as a medium of instruction. There is nothing in proviso (b) that would justify the strictures imposed upon it by the High Court in *PP v. Mark Koding* so as to exclude from the expression "use of a language" its use as a medium of instruction.

[59] It cannot seriously be argued that the framers of the Federal Constitution had intended for schools employing a language other than Malay or English as a medium of instruction to be unlawful and contrary to the terms of the Constitution, for if this were the case, such schools would have been shut down, abolished or converted upon the adoption of the Constitution. As explained, it was not in material dispute that schools employing Tamil or Chinese as a medium of instruction had existed even before the promulgation and adoption of the Federal Constitution.

[60] If the existence of vernacular schools were not *ultra vires* the Constitution at its inception, then the only other argument that may conceivably be advanced is that such schools became unconstitutional with the amendment to art. 152(6) in 1971. In our considered view, this argument is similarly untenable, because there was nothing in the record of Parliamentary proceedings that suggested that Parliament had intended for the amendment to art. 152(6) to strike at the legality or constitutionality of vernacular schools.

[61] In construing the terms of the Federal Constitution, in particular the scope of art. 152 and the intent of the framers of the Constitution, we have adopted a more generous and less rigid approach than that which would have otherwise been applied in construing ordinary legislation. We have also considered the history and background of vernacular schools and the various reports affecting the national education system both before and immediately after Merdeka. We observe that the historical background has been more than capably dealt with by Nazlan J at the High Court at paras. 23 to 52 of his grounds of judgment.

[62] In summary, therefore, a contextual construction of the relevant provisions of the Federal Constitution does not support the contention of the plaintiffs that the provisions of the Education Act 1996 providing for the establishment and maintenance of national-type schools employing Tamil or Chinese as a medium of instruction are inconsistent with art. 152 of the Federal Constitution.

Whether The Establishment And Existence Of The National-type Schools Infringe Articles 5, 8, 10, 11 And 12 Of The Federal Constitution

[63] The plaintiffs in Suit 84 sought a declaration that the existence of national-type schools was in contravention of certain provisions in the Federal Constitution providing for the fundamental liberties of individuals, specifically art. 5 (the right to life and liberty), art. 8 (the right to equality before the law), art. 10 (the right of freedom of speech and expression),

art. 11 (the right to religion) and art. 12 (the right of equal access to education). The issue underlying this prayer was posed as a question of law before the High Court at Kuala Lumpur in the O. 14A proceedings.

[64] We have concluded that, not only are the establishment and maintenance of national-type schools not inconsistent with art. 152(1), but also that the use of Tamil and Chinese in such schools are subject to the protection accorded under the art. 152(1)(b). That being the case, we fail to see how it may reasonably be argued that these constitutionally protected rights militate against the fundamental liberties in Part II of the Federal Constitution.

[65] There was a second fundamental challenge besetting the appellants. They had sought to advance the argument that the existence of the national-type schools disadvantaged the attendees of such schools, and that it was these attendees' fundamental liberties that were impinged by the continued existence of such schools.

[66] For instance, art. 5(1) provides as follows:

> Liberty of the person
>
> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[67] The right to life has been held to mean the right to live with human dignity, and would include the right to adequate nutrition, shelter and human interaction within a functioning society. The existence of the national-type schools, according to the appellants, do not confer upon the attendees of the schools an adequate command of the Malay language, which would impinge upon their ability to earn a living and to fully interact with all facets of society. Thus, properly understood, the appellants' constitutional challenge emanated at least partly from a sense of concern over the well-being for the attendees of the national-type schools, who would be, in the main, students of Chinese and Indian descent.

[68] Though the appellants must rightfully be applauded for their regard and altruism for their fellow Malaysians, this submission overlooks the fact that enrolment in a national-type school is entirely voluntary. There would be nothing in the law that would prevent the parents of a child from choosing a national school (with Malay as the medium of instruction) over a national-type school. Thus, even if the reduction in opportunities is real, not merely illusory, the decision to attend a national-type school would not have been one forced upon the parents of the child, and would have been made with the attendant benefits of a national-type school in mind, such as perhaps the preservation of the sense of connection to one's culture and heritage, and indeed the promotion of the diversity and multi-culturalism that makes our society unique. That there exists a choice would vitiate any notion of impingement of fundamental liberties.

[69] We accordingly affirmed the finding and conclusion of the High Court at Kuala Lumpur, which were that the question posed must be answered in the negative.

Locus Standi And Justiciability

[70] Having disposed of the entirety of the substantive appeals on the two questions posed, we did not consider it necessary for us to address at length the two remaining questions, relating to the *locus standi* of the plaintiffs and the justiciability of the matters forming the dispute in this case, except to observe that where there is said to exist violations of constitutional safeguards, the court should not be shy to conclude that, save for plainly frivolous cases, an ordinary citizen ought always be clothed with the necessary *locus standi* to seek legal redress before the courts, and that matters pertaining to the construction of written laws and the Federal Constitution should always be within the remit of the courts.

Conclusion

[71] For the reasons explained in this judgment, all the appeals were dismissed, save for the appeal in Appeal No. 458, which was allowed. In light of the fact that the matters raised were in the public interest, we directed that parties bear their own costs.

Endnotes:

1. We are aware that there is, strictly speaking, no signal spoken Chinese language, but a number of different dialects based upon a uniform script. Nonetheless, for the purpose of this judgment, we have adopted the nomenclature employed in legislation and in the Federal Constitution.
2. The decision of the High Court relating to the suitability of the O. 14A procedure is reported as *Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors* [2022] 6 CLJ 431.
3. Reported as *Mohd Alif Anas Md Noor & Ors v. Menteri Pendidikan Malaysia & Ors And Another Case* [2022] CLJU 1162; [2022] 1 LNS 1162; [2022] 12 MLJ 455.
4. The decision of the High Court at Kota Bharu is reported as *Mohd Azizee Hasan lwn. Menteri Pendidikan Malaysia & Yang Lain* [2022] 8 CLJ 446; [2022] 11 MLJ 615.